

Decision **PROPOSED DECISION OF COMMISSIONER PEEVEY**
(Mailed 5/24/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to establish rules governing the transfer of customers from competitive local carriers exiting the local telecommunications market.

Rulemaking 03-06-020
(Filed June 19, 2003)

**ORDER GRANTING PETITION FOR
MODIFICATION OF DECISION 10-07-024**

1. Summary

This decision grants the Petition for Modification of Decision (D.) 10-07-024, which was filed on February 22, 2013 by O1 Communications, Inc. (O1). In D.10-07-024, commonly referred to as the Mass Migration Order (MO), the Commission established rules to ensure a smooth transition for customers of telecommunications carriers that experience serious operational or financial difficulties and therefore must exit the market. In D.10-07-024, among other things, the Commission established guidelines for involuntary exits,¹ (appended to D.10-07-024 as “Attachment 1”).²

¹ D.10-07-024 at p. 38, Findings of Fact ¶ 8.

² Attachment 1 is titled: “Guidelines for CLEC Involuntary Exits from Local Exchange Services Market.” These guidelines are to be used when a wholesale provider(s) contacts the Commission about the need to initiate a mass migration process, see D.10-07-024 at 43, Ordering 1.

Since D.10-07-024 was issued, O1 had assumed that any dispute over intercarrier compensation would be addressed as set forth in state and federal law, interconnection agreements and tariffs. Recently, however, O1 became involved in a billing dispute with another carrier that believes that D.10-07-024 provides for disconnection for non-payment of disputed intercarrier compensation charges. O1 claims that this interpretation has led to substantial business uncertainty.

Because this issue is of industry-wide interest, O1 filed its Petition for Modification to clarify that the involuntary exit rules were not intended to override or modify state and federal law that preclude carriers from disconnecting one another for intercarrier compensation disputes.

2. Procedural Background

On February 22, 2013, O1 Communications, Inc. (O1) filed a Petition for Modification to clarify that the involuntary exit rules adopted in D.10-07-024 were not intended to override or modify state and federal law that precludes carriers from disconnecting one another due to intercarrier compensation disputes.

Responses to the O1 Petition were filed on March 22, 2013, by Cbeyond Communications LLC (Cbeyond) and by tw telecom of California (tw). On March 25, 2013, Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and Verizon California Inc. (Verizon) (collectively, the Joint Parties) filed a joint response. On April 2, 2013, O1 filed a reply to the joint response. This decision is based on the written pleadings submitted by the parties. No evidentiary hearings were held.

Rule 16.4(d) of the Commission's Rules of Practice and Procedure allows a party to request modifications to a decision after more than a year following the

decision date only if the party justifies why the Petition could not have been presented earlier. The Joint Parties claim that O1's Petition for Modification is not timely because it was filed more than one year after the issuance date of D.10-07-024.

O1 provided a sworn declaration with its Petition³ explaining why the Petition was filed more than one year after issuance of D.10-07-024. O1 only recently learned during a billing dispute that the incumbent local exchange carrier (ILEC) providing it wholesale service interprets the involuntary exit rules in D.10-07-024 to allow disconnection for disputed intercarrier compensation charges. In view of O1's explanation, we find its Petition for Modification was timely filed. No summary denial of the Petition is warranted based on claims of untimeliness.

3. Positions of Parties

3.1. Position of O1 and Supporting Parties

O1 seeks a Commission order modifying D.10-07-024 to affirm that the involuntary exit process cannot be invoked by a carrier to disconnect another carrier for non-payment of disputed intercarrier compensation charges. O1 contends that nothing in D.10-07-024 suggests that the involuntary exit rules were intended to apply to disputes over charges paid by one carrier to another for terminating traffic (i.e. intercarrier compensation charges).

O1 contends that if D.10-07-024 had been intended to override existing precedent, contracts and tariffs, the Commission would have to explicitly provide

³ See the Declaration of Michael Singer Nelson, Vice President of Regulatory and Public Policy, O1 Communications, attached to the Petition.

notice to carriers pursuant to California Public Utilities Code Section 1708⁴ that their substantive rights might be affected and provide an opportunity to be heard.

O1 claims that any use of the involuntary exit rules to disconnect another carrier for non-payment of disputed intercarrier compensation charges would violate state law as set forth in Section 558 which requires that:

[e]very telephone corporation and telegraph corporation operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made.

O1 argues that this requirement applies to all carriers and does not distinguish between wholesale and retail traffic, and that carriers must terminate traffic for one another regardless of whether the traffic originated from an end user or another carrier.

O1 requests that the Commission grant its Petition by adding new Conclusions of Law and incorporating associated changes in the rules adopted in D.10-07-024, as follows:

- 1) The involuntary exit rules are not properly invoked to disconnect a carrier for nonpayment of disputed usage or intercarrier compensation charges to any other carrier, including that carrier's affiliates such as parents or subsidiaries;
- 2) Any carrier invoking the involuntary exit rules must provide specific notice to the carrier targeted for disconnection that it has contacted the Commission and initiated the involuntary exit process;

⁴ Unless other specified, all subsequent section citations herein refer to the California Public Utilities Code.

- 3) The target of the involuntary exit process must be given an opportunity to be heard and to present documentation that any non-payment was due to disputed usage or intercarrier compensation charges;
- 4) The target of the involuntary exit process is not required to notify its customers unless and until the Commission staff determines that the threatened disconnection is not related to intercarrier compensation charges.

Cbeyond supports O1's Petition, affirming that any carrier invoking the involuntary exit process must first notify the carrier threatened with disconnection. Cbeyond notes that D.10-07-024 does not expressly require notice to the carrier being threatened with disconnection that the involuntary exit process has been invoked. Cbeyond argues that simultaneous notice to the Commission staff and the carrier should be given, with an opportunity to be heard by staff prior to being required to notify its customers about a threatened disconnection.

twf also supports the O1 Petition, and interprets the involuntary exit rules in applying only where a carrier fails to pay undisputed service charges to its wholesale provider. twf believes that use of the involuntary exit process to disconnect non-paying carriers for either disputed charges or intercarrier compensation charges, however, would be inappropriate. To the extent that there is an ambiguity, twf agrees that the Commission should modify D.0-07-024 to make clear that carriers may not use the involuntary exit process to disconnect other carriers for disputed intercarrier compensation charges.

3.2. Opposition of the Joint Parties

AT&T and Verizon (the Joint Parties) oppose the O1 Petition, arguing it was not timely filed under the Commission's rules. They also claim that granting the Petition would cause needless litigation and confusion insofar as it would

prohibit or delay wholesale carriers from exercising their rights under applicable interconnection agreements or tariffs. The Joint Parties believe no modification to the involuntary exit rules in D.10-07-024 is needed or required.

The Joint Parties characterize O1's position as arguing that if the wholesale customer fails to pay any intercarrier compensation charge, the matter should be presumed to be disputed even if there is no bona fide dispute with respect to the particular charge at issue.

The Joint Parties claim that the Petition would circumvent carriers' rights and obligations set forth in applicable interconnection agreements or tariffs, by imposing on ILECs an obligation to obtain Commission approval before disconnecting, even if such approval is not required under the interconnection agreement or tariff. The Joint Parties claim it would be inappropriate and unlawful for the involuntary exit rules to override these substantive, Commission-approved terms when a carrier is facing disconnection for breach of contract or tariff. The Joint Parties argue that any rules regarding involuntary exits should not interfere with dispute resolution mechanisms set forth in tariffs, interconnection agreements and commercial contracts.

4. Discussion

We conclude that the O1 Petition for Modification has merit. The language in D.10-07-024 setting forth the involuntary exit guidelines is ambiguous and warrants clarification. The language could be interpreted to suggest that payment disputes between carriers could result in the wholesale carrier determining that customer carrier is subject to involuntary market removal, thus taking action to lead to a disruption in service.

The guidelines, as set forth in Attachment 1 to D.10-07-024, state that "[t]he wholesale provider may proceed with termination of service to the CLEC in

accordance with the wholesale provider's termination notice if nonpayment or breach of contract has not been cured."⁵ Attachment 1 further states that "[f]ailure to pay any one of the underlying providers may result in involuntary disconnection of service."⁶ The involuntary exit guidelines also state that as long as the wholesaler complies with notification requirements, it can halt service to an end-user unless the end-user has requested service directly from the wholesaler.⁷

If a carrier is being placed into involuntary exit procedures over a disputed charge and end-users would have their service terminated as a result, that carrier's forced disconnection would be in conflict with the requirements of Section 558. Section 558 does not permit a dispute over interconnection charges between carriers to disrupt service. The pertinent portion of Section 558 states:

Every telephone corporation and telegraph corporation operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made.

Section 558 applies to all carriers and does not distinguish between wholesale and retail traffic. Carriers are required to terminate traffic for one another regardless of whether the traffic originated from an end user or another carrier.

Clarification of D.10-07-024 is thus warranted regarding the involuntary exit process, with specification that a wholesale provider shall not cease service

⁵ D.10-07-024, Attachment 1 at 4.

⁶ D.10-07-024, Attachment 1 at 2.

⁷ D.10-07-024, Attachment 1 at 4-5.

to end users during an ongoing dispute over intercarrier compensation. This conclusion is consistent with our previous interpretations of Section 558. In D.97-11-024, for example, we stated:

We conclude that all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper. The obligation to complete calls applies not just to ILECs, but equally to all carriers involved in the origination, routing, and completion of calls. Whether a call originates or terminates on a carrier's network, the obligation to complete calls is the same. This obligation is a fundamental principle and expectation underlying both state and federal statutes.⁸

In D.97-11-024, we went on to state that “[n]o carrier has the right to block or misdirect the routing of calls to their intended destination because the carrier believes that it is not being properly compensated for such calls.”⁹ Disputes between carriers were to be settled separately from the act of connecting calls.¹⁰ Lastly, we concluded that “all carriers are entitled to have their calls routed and completed by other carriers in the manner they have requested. These rights are not nullified by disputes over intercarrier compensation arrangements, disputes over tariff violations, or other areas of disagreement.”¹¹

Subsequently, in D. 98-02-043, we found “no exceptions, no alternatives, no conditions incorporated into the clear requirement of Section 558 that each

⁸ D.97-11-024, 76 CPUC 2d at 460.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 461.

interconnected carrier is obligated to receive, transmit, and deliver the telecommunications of the people of the State.”¹²

The only opposition to the O1 Petition comes from AT&T and Verizon (i.e., the Joint Parties). Although they oppose the Petition, the Joint Parties offer no convincing arguments to support their opposition. The Joint Parties also claim that O1 seeks to modify the involuntary exit rules in D.10-07-024 to prevent disconnection for intercarrier compensation charges even if the validity of such charges are undisputed. O1 explains, however, that it is seeking clarification only that carriers may not use the involuntary exit process to unilaterally disconnect one another for disputed intercarrier compensation charges.

We also find the Joint Parties’ claim unpersuasive that granting the Petition would circumvent carriers’ rights and obligations set forth in carriers’ applicable interconnection agreements or tariffs, filed and approved by the Commission.

The Joint Parties argue that the involuntary exit rules apply only to a notice requirement, and that any requirement to do more than notify the Commission that one carrier is about to disconnect another carrier would override tariffs or interconnection agreement provisions for nonpayment of undisputed charges. The involuntary exit rules require that carriers follow the contractual process to which they agreed for addressing non-payment of charges, stating:

Where the wholesale provider’s experience determines that treatment action for breach of contract or nonpayment of wholesale services will result in interruption of service to a CLEC’s retail service end-users, the wholesale provider shall notify the Director of the Communications Division of the

¹² D.98-02-043, 78 CPUC 2d at 493.

pending wholesale termination at least 30 days prior to such termination.¹³

The involuntary exit rules expressly authorize Commission staff to “address any issues related to termination of CLEC service on an expedited basis including . . . ordering the CLEC or the wholesale provider to continue to provide service to its critical services end-user customers (hospitals, nursing homes, fire stations, police stations, etc.).”

As noted by O1, however, allowing a carrier to proceed with disconnection during the pendency of a complaint case between two carriers or a Commission investigation would render the involuntary exit rules meaningless. Until the complaint case is resolved or the investigation is completed, the involuntary exit rules already require the disconnecting carrier to obtain Commission review before suspending the wholesale service.

The Joint Parties do not dispute that state and federal law precludes carriers from disconnecting one another for disputes over intercarrier compensation. They admit that Section 558 precludes carriers from disconnecting one another for disputed intercarrier compensation charges.

Accordingly to prevent possible misinterpretation of the involuntary exit process, we shall modify D.10-07-024 to add clarifying language affirming that the wholesale provider or other connecting carrier shall not disrupt service to end-users during an ongoing dispute with a carrier. We shall modify D.10-07-024 to clarify that the involuntary exit rules are not intended to override or modify state and federal law that preclude carriers from disconnecting one another for

¹³ See D.10-07-024, Attachment 1 at 2.

intercarrier compensation disputes. We grant the O1 Petition, incorporating additional clarification in the involuntary exit guidelines.

We shall also add clarifying language to the first objective paragraph of the involuntary exit guidelines (Attachment 1 to D.10-07-024). The last sentence of that first objective paragraph of the guidelines reads as follows: “[f]ailure to pay any one of the underlying providers may result in involuntary disconnection of service.” We shall add the following sentence: “The involuntary exit guidelines shall not be invoked if an ongoing dispute regarding intercarrier compensation exists between carriers.”

The necessary modifications to D.10-07-024 to implement the clarifications that we adopt are set forth in the ordering paragraphs and attachment to this decision as set forth below.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner, and Thomas R. Pulsifer is the assigned ALJ for this proceeding.

6. Comments on Proposed Decision

The proposed decision of ALJ Pulsifer in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on June 13, 2013 and reply comments were filed on June 18, 2013. We have incorporated them as appropriate.

Findings of Fact

1. In D.10-07-024, the Commission established rules for involuntary market exits for CLECs.

2. Some carriers may be interpreting D.10-07-024 as authorizing use of the involuntary exit process to disconnect one another for non-payment of intercarrier termination charges.

3. O1 recently learned during a billing dispute that the ILEC providing it wholesale service misinterprets the involuntary exit rules to allow disconnection for disputed intercarrier compensation charges

4. Carriers' disputes as to the interpretation of D.10-07-024 have led to substantial business uncertainty.

5. The issue raised by O1 regarding the interpretation of the involuntary exit rules is one of industry-wide interest that is appropriate for resolution through a Petition for Modification of D.10-07-024.

6. In D.97-11-024, the Commission stated that "[n]o carrier has the right to block or misdirect the routing of calls to their intended destination because the carrier believes that it is not being properly compensated for such calls."

Conclusions of Law

1. The Petition for Modification was timely filed by O1 Communications, Inc. No summary denial of the Petition is warranted based on claims of untimeliness

2. The language in D.10-07-024 is ambiguous with respect to carriers' rights and obligations surrounding use of the involuntary exit rules to disconnect one another for non-payment of disputed intercarrier termination charges.

3. If a carrier is placed into involuntary exit procedures over a disputed charge and end users would have their service terminated due to the dispute, the carrier's forced disconnection would violate Pub. Util. Code § 558.

4. Pub. Util. Code § 558 does not permit a disputed over intercarrier termination charges to disrupt service, but require carriers to terminate traffic for

one another regardless of whether the traffic originated from an end user or another carrier.

5. Language adopted in the appendix hereto would harmonize with Pub. Util. Code § 558.

6. D.10-07-024 should be modified to affirm that the involuntary exit rules set forth therein were not intended to override or modify, in any way, state and federal law that precludes carriers from disconnecting one another for intercarrier compensation disputes.

7. The Petition for Modification of D.10-07-024 should be granted in accordance with the Ordering Paragraphs set forth in this decision.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision 10-07-024, filed on February 22, 2013 by O1 Communications, Inc., is granted in accordance with the revisions set forth in the Appendix to this decision.

2. Rulemaking 03-06-020 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX

APPENDIX

**AMENDED VERSION OF INTRODUCTORY SECTION OF THE
“GUIDELINES FOR CLEC INVOLUNTARY EXITS FROM LOCAL
EXCHANGES SERVICES MARKET, ENTITLED: “OBJECTIVE”**

The following amended version of the introductory section of D.10-07-024, Appendix 1 is adopted, with new text highlighted in underline.

Objective

When a wholesale provider(s), either an Incumbent Local Exchange Carrier (ILEC) or a Competitive Local Exchange Carrier (CLEC), contacts the Commission about the need to initiate a mass migration process for a CLEC, procedures should be followed to ensure the CLEC notifies its end-user customers that their service will be terminated at least 15 days prior to such termination. This circumstance arises because some CLECs may utilize multiple vendors in order to offer services to their end-users – for example, one for dial tone and one for unbundled local loops. Failure to pay any one of the underlying providers may result in involuntary disconnection of service. The involuntary exit rules do not provide an independent process for a telecommunications carrier to discontinue service to another carrier, subject to the following limitations and restrictions:

- (a) The involuntary exit guidelines shall not be invoked to disconnect a carrier for nonpayment of disputed usage or disputed intercarrier compensation charges to any other carrier, including that carrier’s affiliates such as parents or subsidiaries; where such charges (i) have been disputed in accordance with the procedure set forth in carriers’ interconnection agreement or an applicable tariff provision or provision in another contract, and (ii) the dispute has not yet been resolved according to those procedures;
- b) Any carrier invoking the involuntary exit rules must provide specific notice to the carrier targeted for

- disconnection that it has contacted the Commission and initiated the involuntary exit process;
- c) The wholesale provider initiating of the involuntary exit process must certify within its 30-day notice to the Communications Division if the threatened disconnection is not the result of any non-payment that was due to disputed usage or disputed intercarrier compensation charges. This certification is subject to Rule 1 sanctions under the Commission's Rules of Practice and Procedure
- d) The target of the involuntary exit process is not required to notify its customers unless and until the Commission staff determines that the threatened disconnection is not related to disputed usage or disputed intercarrier compensation charges.

(END OF APPENDIX)